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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 768

J. R. FRANKEL, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

No. 769

J. RAY MCDERMOTT & CO., INC., PETITIONER

v.

FEDERAL POWER COMMISSION

No. 776

THE SUPERIOR OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

OPINION BELOW

The opinion of the court of appeals (Appendix B to the petition of The United Gas Improvement Company *et al.*, O.T. 1964, No. 671) is reported at 335 F. 2d 1004. The opinions of the Federal Power Commission, Opinions Nos. 398 and 398A, are published at 30 FPC 283 and 682.

JURISDICTION

The judgment of the court of appeals was entered August 14, 1964. Timely petitions for rehearing filed by the present petitioners were denied on September 22, 1964. The petitions for a writ of certiorari were filed on December 17 and 19, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Where a court of appeals has invalidated a Federal Power Commission order granting an unconditioned certificate of convenience and necessity and, on remand, the Commission conditions the certificate so as to require an initial price lower than the applicant's contract price, may the Commission require refunds of excess amounts collected under the original invalid certificate?

2. May the courts rule on the propriety of the Commission's failure to allow a natural gas producer reimbursement of royalty payments allegedly made to the United States for off-shore gas in lieu of taxes,

where the issue was not presented to the Commission and petitioner offered neither allegations nor evidence to support any claim to such reimbursement?

3. Where, pursuant to judicial remand, the Commission, *inter alia*, orders refunds of excess amounts collected for deliveries made under improperly issued unconditioned certificates of convenience and necessity, is a producer entitled to be freed of such refund obligation because it has subsequently transferred the lease of the property from which the deliveries were made?

4. Is delivery of gas under a sales contract rendered exempt from Commission regulation by the fact that payment is made before the purchaser calls for delivery, as permitted by the contract?

STATUTES INVOLVED

Pertinent provisions of Sections 4, 5 and 7 of the Natural Gas Act are set forth in Appendix C (pp. 31a-34a) to the petition of the Public Service Commission of New York, O.T. 1964, No. 678. Sections 1(b) and 19(b) are set forth in Appendix B (pp. 49-50) of the petition of The Superior Oil Company, O.T. 1964, No. 776.

STATEMENT

In these petitions, producers of natural gas seek review of the same court of appeals' decision which is the subject of the pending petitions in *The United Gas Improvement Co., et al.* v. *Callery Properties, Inc.*, O.T. 1964, No. 671; *Public Service Commission of New*

York v. *Callery Properties, Inc.*, O.T. 1964, No. 678; *Ocean Drilling and Exploration Co.* v. *Federal Power Commission*, O.T. 1964, No. 714; and *Federal Power Commission* v. *Callery Properties, Inc.*, O.T. 1964, No. 756. The relevant facts are more fully set forth in our petition in No. 756 and in our memorandum in No. 714. Briefly summarized, the decision below set aside a Power Commissioner order which, under prior judicial remands of unconditioned certificates of convenience and necessity, conditioned the certificates upon the producer-applicants' (1) observing a specified initial price, lower than the contract prices; (2) not filing price increases above a specified triggering level for a stated period of time; and (3) refunding to the pipeline purchasers all amounts previously collected in excess of the initial price determined by the instant order. As to condition (3), the court below sustained the Commission's authority to order refunds in connection with charges collected under the original invalid certificates, but ruled that such refunds should be measured by "just and reasonable" rates to be subsequently determined in rate proceedings, rather than by the initial public convenience and necessity rate determined in the Section 7 certificate proceeding. Petitioners in Nos. 671, 678 and 756 seek review of the court's ruling as to the measure of refunds. Petitioner in No. 714, a producer, seeks review of the court's holding that the Commission has authority to order any refunds at all.

To the extent that further facts are involved in the present petitions, they are set forth below at the appropriate points in the Argument.

ARGUMENT

1. Because of the interrelationship of the two rulings concerning refunds (*i.e.*, the Commission's authority to order refunds and the measure of the refunds), we have acquiesced in the granting of certiorari in No. 714 if the Court grants certiorari as to the refund issue raised in our petition, No. 756, and in Nos. 671 and 678.

The present petitions raise the same refund issue tendered in No. 714. Accordingly, we similarly acquiesce in the granting of the present petitions as to the refund issue if certiorari is granted as to the refund issue in No. 671, 678 and 756.

While we believe that petitioners have not accurately stated the refund question, our acquiescence embraces the substance of the issue presented by the question set forth in the text of the *McDermott* petition (No. 769, p. 2); by questions 1 and 3 of the *Frankel* petition (No. 768, pp. 2-3); and by questions 1, 2 and 3 of the *Superior* petition (No. 776, pp. 2-3).

2. The present petitions seek review of a miscellany of minor questions involving no important issues of principle or of general applicability. None of the issues so tendered warrants this Court's consideration, and the injection of those questions would complicate the litigation to the detriment of resolution of the fundamental questions presented by the pending related petitions.

a. *McDermott (No. 769).*—In a footnote (Pet. p. 2, n. 2), McDermott purports to present or preserve a question as to the Commission's failure to allow it

reimbursement of payments made to the United States in lieu of taxes. This issue was never raised before the Commission; specifically, it was not presented in a petition for rehearing.[1] Accordingly, neither the court below nor this Court would have jurisdiction to consider it. Section 19(b); *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 307; *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 364 U.S. 137, 157-158; *Federal Power Commission* v. *Colorado Interstate Gas Company*, 348 U.S. 492; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 649, 650-651. Nor does the record contain a scintilla of evidence on which a decision of the question could be based.[2]

In any event, the issue sought to be raised is of no general applicability and of no substantial importance either legally or factually.[3]

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[1] The administrative record is not reproduced in its entirety. In the court below the parties designated for printing in the joint appendix those portions of the record they wished. McDermott did not designate its petition for rehearing, nor has it alleged, either in the court below or in its present petition, that it properly presented this issue to the Commission. Should the Court desire, we will provide copies of McDermott's petition for rehearing.

[2] Neither before the Commission, nor in the court below, nor in its present petition has McDermott made any factual allegations tending to support—or even to explain—its contention. See footnote 1, *supra*.

[3] Royalty payments to the United States in lieu of taxes are provided by Section 6 of the Outer Continental Shelf Lands Act, 67 Stat. 466, 43 U.S.C. 1335(a)(9). They are measured

b. *Frankel (No. 768).*[4]—Prior to the Commission order, Frankel, with the approval of the Commission, had transferred the gas producing property covered by the certificate to Continental Oil Company, which thereupon settled its case and has abided by the settlement terms for all deliveries under its certificate since its acquisition of the property. Frankel now seeks to avoid any responsibility for excess charges in connection with the deliveries it made under the improperly issued unconditioned certificate before transferring the property. Manifestly, if the Commission acted properly in ordering refunds for the past period, Frankel must be held responsible for those due for the period of its operations under the certificate. It cannot legally or equitably be permitted to retain moneys improperly collected simply because of a subsequent sale of the producing leases. Even if the point were less clear, the issue presented—involving, as it does, a unique factual situation—would not be of sufficient importance to warrant review by this Court.

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by reference to State severence taxes in effect on August 7, 1953. While the Louisiana tax situation as of that date is unclear, it appears that the maximum amount McDermott might be required to pay the United States under this provision is around 2½ mills per Mcf, which is less than the amount of State taxes, where applicable, which the producers are generally required to absorb by their contracts and by the Commission's order.

[4] J. R. Frankel *et al.*, petitioners, are the stockholders of the corporate successor, in dissolution, of the original certificate applicants. See Petition, p. 3, n. 3. We here refer to the original applicants and the successors as "Frankel," without distinction.

c. *Superior (No. 776).*—Superior's fourth question (Pet. p. 3) involves charges collected by Superior under its improper, unconditioned certificate for gas not delivered until after the collections were made. Superior's contract requires that the purchaser, United Gas Pipe Line Company, periodically purchase and pay for specified minimum quantities; if the purchaser does not take delivery during the specified period, it is entitled to demand that delivery during a subsequent "make-up" period, then paying only the excess, if any, of the legal price at that time over the amount already paid during the contract period.[5]

When, pursuant to judicial remand, the Commission imposed initial price and refund conditions on Superior's certificate, it provided that the amount of gas the purchaser was entitled to receive for the prepayments it had made was to be measured by the proper unit price determined by the Commission rather than by the original contract price. The short of the matter, therefore, is that the Commission has required that any gas sold under the certificate should be delivered and paid for at the Section 7 certificate initial price properly determined by the Commission

[5] The Commission has now pending a rule-making proceeding concerning the proper scope of permissible take-or-pay provisions. Docket No. R-199, 26 Fed. Reg. 4615, May 26, 1961. In the present action, the Commission ordered that the contracts here involved shall be subject to the final action in the rule-making proceeding, subject to a floor on required payments of 80% of the contracted amount. The court below held this action to be not presently reviewable, and nobody has sought review by this Court of that ruling.

as applicable to the deliveries.[6] The court below was manifestly correct in ruling that Superior's collection of the price and later delivery of gas under its contracts constitute "a sale within [the Commission's] power of regulation" (Superior Pet., p. 46). To hold that prepayment removes the delivery of the gas from the coverage of the Act would provide a ready means for evading the law.

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[6] It should be noted that the order does not require cash refunds with interest, as is required in connection with excess collections other than prepayment.

CONCLUSION

If the Court agrees to consider the third question presented by the Commission's petition in No. 756, we acquiesce in the Court's also granting the present petitions to the extent that they bring in issue the Commission's authority to order refunds of excess charges collected under certificates which the courts have since held were improperly issued without initial price conditions. In all other respects the petitions for certiorari should be denied.

Respectfully submitted.

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